

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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In re DIGITAL MUSIC ANTITRUST  
LITIGATION

X  
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X

MDL Docket No. 1780

**DEFENDANTS' NOTICE OF SUPPLEMENTAL AUTHORITY IN FURTHER  
SUPPORT OF MOTION TO DISMISS AND TO STRIKE PORTIONS OF PLAINTIFFS'  
THIRD CONSOLIDATED AMENDED COMPLAINT**

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Defendants respectfully submit the attached supplemental authority, *In re Wellbutrin XL Antitrust Litigation*, 2010 U.S. Dist. LEXIS 135566 (E.D. Pa. Dec. 22, 2010), which pertains to Defendants' Motion to Dismiss Count IV for alleged violation of the Illinois Antitrust Act.

In *Wellbutrin*, the district court analyzed the Supreme Court's opinions in *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431 (2010), concluding that “[a] majority of the Court . . . rejected Justice Scalia's Rules Enabling Act analysis that only examines the Federal Rule on its own in favor of an analysis that considers important state interests.” *Wellbutrin*, 2010 U.S. Dist. LEXIS 135566, at \*14. The *Wellbutrin* court found that Justice Stevens's approach formed the “narrowest grounds” in *Shady Grove* and approvingly cited lower courts holding that Justice Stevens's Rules Enabling Analysis is controlling. *Id.* at \*13-14 (citing *McKinney v. Bayer Corp.*, 2010 U.S. Dist. LEXIS 103516, at \*29 (N.D. Ohio Sept. 30, 2010); *Bearden v. Honeywell Int'l, Inc.*, 2010 U.S. Dist. 83996, at \*30 (M.D. Tenn. Aug. 16, 2010); *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 2010 U.S. Dist. LEXIS 69254, at \*6-8 (N.D. Ohio July 12, 2010)).

In denying the *Wellbutrin* indirect purchaser plaintiffs' motion to amend their complaint to include claims under the Illinois Antitrust Act (“IAA”), Judge McLaughlin concluded that “the IAA's restrictions on indirect purchaser actions are distinguishable from the provisions addressed in *Shady Grove*.” *Wellbutrin*, 2010 U.S. Dist. LEXIS 135566, at \*19. “The Illinois restrictions on indirect purchaser actions are intertwined with Illinois substantive rights and remedies because (1) the restrictions apply only to the IAA, (2) they are incorporated in the same statutory provision as the underlying right, not a separate procedural rule, and (3) the restrictions appear to reflect a policy judgment about managing the danger of duplicative recoveries.” *Id.* at \*19-20. “Because the indirect purchaser restrictions of the IAA are ‘intertwined’ with the

underlying substantive right, application of Rule 23 would ‘abridge, enlarge or modify’ Illinois’ substantive rights, and therefore Illinois’ restrictions on indirect purchaser actions must be applied in federal court.” *Id.* at \*20.

Accordingly, Plaintiffs in this case may not maintain their claim on behalf of the putative Illinois class and the class allegations relevant to that claim should be stricken. Defendants respectfully refer the Court to their earlier-filed briefs at Docket No. 78 (at pp. 27-30) and Docket No. 96 (at pp. 20-24) for a discussion of Plaintiffs’ claim under the New York statute.

DATED: January 13, 2011

Respectfully submitted,

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